MOHD SOBRI CHE HASSAN v. PIHAK BERKUASA TATATERTIB MAJLIS PERBANDARAN SEBERANG PERAI & ANOR

HIGH COURT MALAYA, PULAU PINANG
COLLIN LAWRENCE SEQUERAH JC
[JUDICIAL REVIEW NO: 25-21-02-2014]
3 DECEMBER 2015

ADMINISTRATIVE LAW: *Judicial review – Municipal officer – Transfer to different department – Issue of transfer brought to attention of State Assemblyman – Whether amounted to breach of discipline – Whether dismissal appropriate – Whether in accordance with Public Officers Regulations (Conduct and Discipline) Rules 1995 – Whether applicant given reasonable opportunity to be heard – Whether respondents guilty of bias – Local Government Act 1976, s. 16(4) – Federal Constitution, art. 135(2)*

CONTRACT: *Specific performance – Contract of service – Dismissal – Reinstatement – Whether applicant could resort to provisions of Industrial Relations Act 1967 – Whether applicant could claim for reinstatement – Whether court could order specific performance of contract of personal service – Whether applicant could only claim for damages – Specific Relief Act 1950, s. 20(1)(b)*

The applicant, an officer with Majlis Perbandaran Seberang Perai ('the second respondent') was transferred from the engineering department to the health services department within the second respondent's organisation on 14 March 2012. Pursuant to this, the applicant filed a civil suit at the High Court to challenge the transfer. The High Court dismissed the said suit on procedural grounds and the applicant's subsequent appeal to the Court of Appeal was also dismissed. The applicant then brought the issue of his transfer ('the said issue') to the State Assemblyman for Penaga who raised the said issue in one of the Penang State Assembly meetings. The respondents contended that the applicant's conduct was an attempt to bring external pressure to support his claim relating to his transfer, and that it amounted to a breach of discipline meriting the punishment of dismissal or reduction in rank under the Public Officers Regulations (Conduct and Discipline) Rules 1995 ('the Regulations'). As a result, the first respondent, *inter alia*, directed the applicant to make a written representation to exculpate himself on the charges against him. The applicant in his letter dated 11 October 2013, denied the charges, provided explanations together with documents in support and requested that an inquiry panel be formed to investigate the charges. Subsequent to the applicant's letter, the applicant's head of department formed the view that the applicant's representations against the charges were reasonable and that the decision of the first respondent to take disciplinary proceedings with the intention of dismissing or demoting the applicant was not warranted. This opinion notwithstanding, the first respondent, however, informed the applicant that pursuant to a meeting held

on 28 November 2013 and after deliberating the charges and the explanations provided, the applicant was found guilty as charged and dismissed from service. Aggrieved with the decision, the applicant filed the present application for judicial review. The grounds raised by the applicant amongst others were that (i) the first respondent had breached s. 16(4) of the Local Government Act 1976 ('LGA') and art. 135(2) of the Federal Constitution ('FC') in failing to give the applicant a reasonable opportunity to be heard; and (ii) the meeting of the disciplinary panel held on 28 November comprising of the Tuan Yang Di-pertua and the Municipal Secretary of the second respondent (which decided to dismiss the applicant) was not conducted in a fair manner and there was biasness against the applicant due to the High Court suit. The issues that arose for the court's determination, *inter alia*, were: (i) whether the failure to hold a hearing or inquiry and investigations had resulted in a breach of natural justice and procedural impropriety; (ii) whether the respondents were guilty of bias against the applicant; and (iii) whether court could order specific performance of a contract of personal service.

Held (dismissing application with costs):

(1) Section 16(4) of the LGA to which the applicant was subjected states that no officer or employee shall be reduced in rank or dismissed without being given a reasonable opportunity of being heard. However, although the wording was similar to the provision in art. 135(2) of the FC, it did not put the applicant on the footing similar to that of a public officer. Since the applicant did not fall under the category of officers or employees under art. 132 of the FC, the applicant was not entitled to the protection and privileges under art. 135 of the FC. (paras 120 & 122)

(2) The applicant was employed based upon terms and conditions in a contract of service and was subjected to the terms and conditions contained in the letter of appointment. The applicant was at all times subject to, *inter alia*, the Regulations. However, the use and enforcement of the Regulations in the disciplinary proceedings against the applicant by the first respondent did not have the effect in law of making the applicant a holder of an office as provided under art. 132 of the FC. (paras 123 & 124)

(3) There were no conditions or specific stipulation in the applicant's letter of appointment that the applicant's post could not be transferred to another department or divisions or sections within the second respondent's organisation. The transfer of the applicant from the engineering department to the health services department did not involve any changes or demotion in the grade, position, status, and salary of the applicant. The transfer was in accordance with the applicant's contract of service and did not breach any conditions of the

same. The applicant's contract of service continued and the relationship between the second respondent and the applicant as employer and employee or master and servant continued unhindered. (paras 128-131)

(4) The 'right to be heard' meant that the officer concerned should be given full opportunity of stating his case. However, it was for the first respondent to decide whether the case against the applicant required further clarification. From the provisions of the General Orders, it is clear that it is never the intention of the Legislature that the courts should step into the shoes of the disciplinary authority in deciding whether it is fair to the applicant in deciding whether to accord an oral hearing or not. On the facts of this case, the first respondent had concluded that they required no such further clarification. In the circumstances, the court could not interfere with the decision of the first respondent. As such, there was no error of law committed by the first and second respondents. (paras 135, 139 & 140)

(5) Although the Yang Di-Pertua and the Municipal Secretary of the Majlis were members of the Disciplinary Board in regard to the disciplinary case involving the applicant's misconduct of coming to work late and were also members of the Disciplinary Board in regard to the second disciplinary case involving the misconduct of attempting to bring outside influence, there was no evidence that they were necessarily biased and therefore ought to be automatically disqualified. (para 152)

(6) The Yang Di-Pertua and the Municipal Secretary had acted in accordance with the law and the LGA and within their management prerogative powers. Further, the civil suit filed in the High Court by the applicant and his appeal to the Court of Appeal were against the decision of the second respondent and had nothing to do with the Disciplinary Board. The Yang Di-Pertua and the Municipal Secretary's involvement in the said transfer and the civil proceeding and their participation in the second disciplinary case did not show that they had prejudged the applicant. Therefore the Yang Di-Pertua and the Municipal Secretary's involvement in the second disciplinary case did not amount to actual bias. (paras 154-156)

(7) The applicant's conduct in not making any application or representation in his written representation to recuse the Yang Di-Pertua and the Municipal Secretary from the Disciplinary Board constituted a waiver by the applicant and barred the applicant from any subsequent complaint in the judicial review proceedings. Automatic disqualification of the Yang Di-Pertua and the Municipal Secretary did not necessarily follow from their involvement in the transfer of the applicant from engineering department to the health services department or from their involvement in the first disciplinary case. (paras 159 & 160)

(8) The court would not order specific performance of a contract of service which existed between the applicant and the second respondent or grant declaratory relief which effectively grants specific performance on a claim of wrongful dismissal. A claim for reinstatement available to a permitted claimant in an Industrial Court or to a holder of a public office as categorised under arts. 132 and 135(2) of the FC was not available to the applicant. As the applicant could not resort to the provisions of the Industrial Relations Act 1967, he accordingly could not claim the declarations that his dismissal was void and it was not possible for him to obtain reinstatement. The applicant could only claim for damages if he could establish that his dismissal was in breach of his contract of service. (paras 168 & 170)

(9) Pursuant to s. 20(1)(b) of the Specific Relief Act 1950 ('SRA'), an employee who has been wrongfully dismissed cannot seek specific performance of his contract of employment. Section 20(1)(b) of the SRA is consistent with the common law position. As a contract of employment is a contract dependent on the volition of the parties, it cannot, in the absence of special circumstances, be specifically enforced either by a declaration that the contract still subsisted or that the dismissal is invalid/void. (para 172)

Case(s) referred to:

Aria Kumar & Anor v. Ketua Pengarah Jabatan Hasil Dalam Negeri, Malaysia & Anor [1994] 4 CLJ 515 HC ***(refd)***

Dr Ganeshwaran KT Balakrishnan lwn. Pengarah Kesihatan Negeri Perak Darul Ridzuan & Yang Lain [2011] 2 CLJ 826 HC ***(refd)***

Ganasan Marimuthu v. Public Services Commission & Anor [1998] 4 CLJ 331 CA ***(refd)***

Ghazi Mohd Sawi v. Mohd Haniff Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 CLJ 333 SC ***(refd)***

Harbhajan Singh v. Suruhanjaya Pasukan Polis, Malaysia & Anor [1999] 5 CLJ 275 HC ***(refd)***

Kerajaan Malaysia & Ors v. Tay Chai Huat [2012] 3 CLJ 577 FC ***(refd)***

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal [2001] 2 CLJ 525 FC ***(dist)***

M Sentivelu R Marimuthu v. Public Services Commision Malaysia & Anor [2005] 3 CLJ 778 CA ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***

Malloch v. Aberdeen Corporation [1971] 2 All ER 1278 ***(refd)***

Mohd Ahmad v. Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor [1997] 3 CLJ 135 FC ***(refd)***

Mohd Dali Yahaya & Satu Lagi lwn. Ketua Polis Negara & Satu Lagi [2010] 1 LNS 326 HC ***(refd)***

Mohd Zainal Abidin Abdul Mutalib v. Dato Seri Dr Mahathir Mohamed, Minister of Home Affairs, Malaysia & Anor [1989] 1 LNS 51 SC ***(refd)***

Ng Hock Cheng v. Pengarah Am Penjara & Ors [1998] 1 CLJ 405 FC ***(refd)***

Pengarah Pelajaran, Wilayah Persekutuan & Ors v. Loot Ting Yee [1981] 1 LNS 186 FC ***(refd)***

Perbadanan Perwira Harta Malaysia & Anor v. Mohd Baharin Hj Abu [2010] 6 CLJ 1 CA ***(refd)***
Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivelu [2008] 6 CLJ 573 FC ***(refd)***
R v. Gough [1993] AC 646 ***(refd)***
Samsuddin Mohd Saad v. Pengarah Hospital Bahagia, Ulu Kinta & Anor [1999] 1 CLJ 138 HC ***(refd)***
Yusof Sudin v. Suruhanjaya Perkhidmatan Polis & Anor [2012] 1 CLJ 448 FC ***(dist)***

Legislation referred to:
Evidence Act 1950, s. 74
Federal Constitution, arts. 132, 135(2)
Local Government Act 1976, ss. 13, 16(4), 17, 28
Public Service Tribunal Act 1977, s. 13(h)
Specific Relief Act 1950, s. 20(1)(b)

For the applicant - Vijayalakshumi M Navaratnam; M/s Vijaya Navaratnam
For the respondents - Murgan D Maniam; M/s Presgrave & Matthews

Reported by Sandra Gabriel

JUDGMENT

Collin Lawrence Sequerah JC:

Introduction

[1] This is a substantive hearing for judicial review by the applicant against the decision by the second respondent to dismiss him from service. The applicant was an officer with the second respondent and was stationed in Bukit Mertajam, Penang at all material times. The first respondent is the disciplinary authority of the second respondent. By way of letter dated 2 December 2013, the applicant was informed that he was dismissed from the service of the second respondent. The chronology of events that led to the dismissal of the applicant were as follows.

[2] The applicant was transferred from the Engineering Department to the Health Services Department on 14 March 2012. Pursuant to this, he filed Civil Suit No. 21NCVC-14-04-2012 at the High Court Pulau Pinang on 10 April 2012 challenging the transfer. The High Court dismissed the said suit on procedural grounds and the applicant's subsequent appeal to the Court of Appeal was dismissed. The applicant has filed for judicial review challenging his transfer which application is currently pending. He subsequently filed the current application for judicial review in respect of his dismissal from the second respondent.

[3] Matters rose to the surface as far as the applicant's dismissal from the second respondent was concerned when the director of management services of the second respondent issued a memorandum dated 29 April 2013 to the director of health services and informed that the second respondent had

received a report that the applicant had brought the issue of his transfer from the Engineering Department to the Health Services Department to YB Dato Haji Azhar bin Ibrahim, the State Assemblyman for Penaga.

[4] The respondents submitted that the said YB Dato Haji Azhar had raised the said issue in the first meeting of the fifth term of the 12th Penang State Assembly which commenced on 30 April 2012 to 8 May 2012.

[5] The action of the applicant, contended the respondents could be construed as attempting to bring any form of influence or external pressure to support or put forward his claim relating to public service and his transfer. An extract of the Hansard 2HB report of the first meeting of the fifth term of the 12th Penang State Assembly was referred to the attention of the director of management services as evidence of this occurrence. In consequence thereof, the director of management services had requested the applicant's head of department who was the health services director to take the necessary action.

[6] By memorandum dated 23 May 2013 the director of health services informed the applicant that a report was received from the Management Services Department in regard to the applicant's attempt to bring any form of influence or external pressure to support or put forward his claim relating to public service and his transfer. A copy of the memorandum dated 29 April 2013 with the heading 'report of misconduct' from the management services director and a copy of the relevant Hansard 2HB report dated 5 September 2012 was attached for the reference of the applicant.

[7] The applicant was required to give a report to explain the related matter to the management. This memorandum constituted a show cause letter by the head of department. At that material time, submitted the respondents, all that ought to be known by the applicant and known to the second respondent against him were already made known to the applicant.

[8] The applicant *vide* memorandum dated 17 June 2013 to his head of department informed him that he had no information regarding the subject matter. As the applicant's head of department was not satisfied with the reply given by the applicant, he requested the applicant *vide* memorandum dated 30 July 2013 to submit a further explanation relating to the same subject matter. Thereafter, *vide* memorandum dated 13 August 2013 to his head of department, the applicant gave an explanation. The director of health services on 26 August 2013 submitted the applicant's reply to the chairman of the first respondent.

[9] On 17 September 2013 the chairman of the first respondent was notified in regard to the alleged breach of discipline of the applicant and was requested to consider whether the breach of discipline complained of was of a nature which merited a punishment of dismissal or reduction in rank or a punishment lesser than a dismissal or reduction in rank pursuant to r. 27 of the Public Officers Regulations (Conduct and Discipline Rules 1995).

[10] On 19 September 2013 the chairman of the first respondent decided that the alleged breach of discipline by the applicant in bringing the issue of his transfer from the Engineering Department to the Health Services Department to the State Assemblyman of Penaga at the material time, YB Dato Azhar bin Ibrahim who following it had raised the matter in the first meeting of the fifth term of the 12th Penang State Assembly which commenced on 30 April 2013 to 8 May 2013, was of a nature which merited punishment of dismissal or reduction in rank in accordance to r. 29 of the Public Officers Regulations (Conduct and Discipline Rules 1995).

[11] On 20 September 2013, the first respondent was required to consider all the available information in regard to the said alleged breach of discipline by the applicant and decide whether there was an infringement of the Code of Conduct in r. 4 of the Public Officers Regulations (Conduct and Discipline Rules 1995) and also consider whether there is a *prima facie* case against the applicant for dismissal or reduction in rank.

[12] On the same date, which is 20 September 2013, the first respondent considered the said matter and was satisfied that there was a *prima facie* case against the applicant and decided to charge the applicant for infringing r. 4(2)(h) of the Public Officers Regulations (Conduct and Discipline Rules 1995).

[13] As a result, the first respondent directed that a statement containing the facts of the breach of discipline alleged to have been committed by the applicant and the proposed ground on which the applicant is to be dismissed or reduced in rank be sent to the applicant and also required him to make a written representation containing grounds upon which he relies to exculpate himself.

[14] The first respondent in its letter dated 4 October 2013, *inter alia,* informed the applicant that it intended to take disciplinary action for the purposes of dismissal or demotion against the applicant and that the applicant was required to give a written representation within 21 days of receipt of the said letter.

[15] The charge against the applicant which was the alleged violation of the Peraturan-Peraturan Pegawai Awam (Majlis Perbandaran Seberang Perai) (Kelakuan dan Tatatertib) 1995 was stated as follows in the said letter dated 4 October 2013:

> Bahawa tuan, Encik Mohd Sobri Bin Che Hassan (12245) Jurutera Gred J41 (No. K.P.: 751215-02-5465), Jurutera Gred J41 semasa bertugas di Jabatan Perkhidmatan Kesihatan, Majlis Perbandaran Seberang Perai telah membawa isu pertukaran tuan dari Jabatan Kejuruteraan ke Jabatan Perkhidmatan Kesihatan kepada Ahli Dewan Undangan Negeri Penaga ketika itu, Y.B. Dato' Azhar Bin Ibrahim yang seterusnya telah membangkitkan perkara tersebut dalam Mesyuarat Pertama Penggal Kelima Dewan Undangan Negeri Pulau Pinang yang Kedua Belas yang

telah berlangsung pada 30 April hingga 8 Mei 2012 jelas bercanggah dengan tatakelakuan Pegawai Awam dan boleh dikenakan tindakan tatatertib selaras dengan Peraturan-Peraturan Pegawai Awam Majlis Perbandaran Seberang Perai (Kelakuan dan Tatatertib) 1995. Perbuatan tersebut boleh ditafsirkan sebagai cubaan membawa pengaruh luar iaitu melanggar peraturan 4(2)(h) seperti berikut:

4(2) Seseorang pegawai tidak boleh:

(h) Membawa atau cuba membawa apa-apa bentuk pengaruh atau tekanan luar untuk menyokong atau memajukan tuntutan berhubungan dengan perkhidmatan awam, sama ada tuntutan itu adalah tuntutannya sendiri atau tuntutan anggota-anggota perkhidmatan awam yang lain.

Jika tuan didapati bersalah, tuan boleh dihukum mengikut Peraturan 39, Peraturan-Peraturan Pegawai Awam, Majlis Perbandaran Seberang Perai (Kelakuan dan Tatatertib) 1995.

[16] The applicant, in his letter dated 11 October 2013, denied the charge against him, providing his explanations together with documents in support and requested that an inquiry panel be formed to investigate the charges against him. His written representation as regards to the charge against him were as follows:

(i) that the charges against him are denied;

(ii) that he has never met YB Dato Azhar bin Ibrahim, the Ahli Dewan Undangan Negeri at the material time;

(iii) that he had, prior to the charges against him, given a full explanation to his Director of the Department of Health *vide* his letter dated 13 August 2013 where he was serving in at the material time;

(iv) that even in his letter of 13 August 2013, he had while giving due explanations, requested for a tribunal of independent inquiry to be held should his explanations be deemed insufficient;

(v) that he was fully aware of the provisions of reg. 4(2)(h) of the Public Officers (Conduct and Discipline) Municipal Council of Province Wellesley Regulations 1995 and that he required no support from the said State Assemblyman for at that time of the alleged misconduct the applicant had brought a suit in the Penang High Court to challenge his move from the Engineering Department to the Health Department;

(vi) that even a brief perusal of the Hansard would reveal that his name had been wrongly stated. His name is Mohd Sobri bin Che Hassan whereas had been wrongly quoted as Muhammad Subri Haji Hassan. Furthermore his job description had been stated wrongly as the Penolong Pengarah Bangunan when the applicant was in fact the Penolong Pengarah Kejuruteraan; and

(vii) that the applicant had made a police report concerning the misquoting of his alleged meeting with Dato' Azhar.

[17] Subsequent to the applicant's 11 October 2013 letter, the applicant's head of department wrote to the chairman of the first respondent *vide* letter dated 18 October 2013. In this said letter the director had given his grounds and/or reasons why the applicant's denial of the charges against him were valid. The director was of the view that the applicant's representations against the charge were reasonable and that the decision of the first respondent to take disciplinary proceedings with the intention of dismissing or demoting the applicant was not warranted.

[18] The first respondent however, issued a letter dated 2 December 2013 informing the applicant that pursuant to a meeting held on 28 November 2013 and after deliberating the charges and the explanation provided, the applicant was found guilty and punished with dismissal. The applicant was never informed that the said meeting was going to take place.

[19] The applicant requested through his solicitors for notes of proceedings and all documents pertaining to the decision that was informed by way of the 2 December 2013 letter.

[20] The first respondent in its letter dated 27 January 2014 provided only the positions of the persons who sat at the meeting but did not provide documents in connection with the disciplinary proceedings on the grounds that it was classified as "SULIT" or confidential in nature.

[21] Being aggrieved with the decision of the first respondent, the applicant filed this application for judicial review.

Applicant's Submissions

[22] The applicant's submissions raised the following grounds to support his application.

Flaws In Commencement Of Disciplinary Proceedings

[23] It was contended that the document provided by the respondents that indicate the matter was brought to the applicant's attention was a letter issued by the Bahagian Pembangunan Korporat dated 15 May 2012. Following this, the applicant's head of department (hereinafter referred to as applicant's HOD) was requested to look into the matter.

[24] The applicant's HOD upon obtaining written explanation from the applicant wrote to the first respondent in his letter dated 26 August 2013 attaching the applicant's explanation and asked for an inquiry of investigation to be formed so the issue could be handled in a rational manner.

[25] However, the first respondent's urusetia proceeded in misquoting the applicant's HOD's request and instead erroneously stated the following:

> 3.1 satu laporan telah diterima daripada Pengarah Perkhidmatan Kesihatan bertarikh 26 Ogos 2013 mengenai kelakuan Encik Mohd Sobri ...

A 3.2 sehubung itu, Ketua Jabatannya pada 26 Ogos 2013 telah mengemukakan laporan kepada pengerusi pihak berkuasa tatatertib … supaya diambil tindakan tatatertib

[26] It was submitted that nowhere can the statements contained in paras. 3.1 and 3.2 above be found in 26 August 2013 letter. The complaint
B did not emanate from the HOD and neither did he recommend disciplinary proceedings.

[27] The first respondent in initiating the disciplinary action had therefore acted on a frolic of its own while depending on wrongly stated facts.

C *Failure To Hold A Hearing Or Conduct Investigations*

[28] The applicant submitted that in his letter of explanation he had given his due explanation and had requested that an investigation be held. The applicant's HOD had also in his 26 August 2013 letter asked for an inquiry to be held.

D **[29]** The first respondent and/or the second respondent failed to grant the applicant a hearing. The first respondent instead held a meeting before coming to its conclusion that the applicant be dismissed.

[30] The first respondent also requested that he be furnished with
E documents, particularly the 'laporan' or report referred to in the first respondent's letter of 4 October 2013 that the first respondent had relied on to dismiss the applicant.

[31] The applicant contends that a hearing or investigation would have ensured the following:

F (i) the presence of the applicant's head of department during the hearing or investigation which would have enabled the applicant to adduce such evidence through the said head of department as to his innocence as regards the charges;

G (ii) the first respondent's letter dated 4 October 2013 refers at the first paragraph to "satu laporan telah diterima …". This shows that there were documents and information in the possession of the first respondent. If such hearing or investigation was held the applicant would have been able to view all such materials that were before the panel deciding the charges against him and to give such evidence and/
H or examine witnesses to rebut or challenge the said materials;

(iii) it would have enabled the applicant to cross-examine such witnesses as to the delay in bringing the disciplinary action when the alleged charge occurred almost a year before the first respondent asked for the
I applicant's explanation;

(iv) it would have enabled the applicant to challenge the accuracy and the correctness of the reference in the State Assembly. This is more so when the applicant's name and position had been wrongly stated; and

(v) it would have enabled the applicant to question such persons as to the contents of the Hansard particularly whether it can be shown there that the applicant attempted or brought any outside influence or pressure as alleged by the respondents. This is more so when it is apparent from the opening statement of the assemblyman, Dato Azhar, in the Hansard as follows, "saya masih dalam tajuk demokrasi PKR yang sudah mati ...", the context was clearly in advancement of Dato Azhar's dissatisfaction with the ruling party and not to put forth the applicant's grouses as alleged and/or charged.

[32] The applicant also contended that the heading and contents of the 2 December 2013 letter from the first respondent stated quite clearly that the intention of the Disciplinary Board was to either dismiss or reduce in rank (demotion) of the applicant.

[33] In this regard, the first respondent in failing to give the applicant a reasonable opportunity to be heard had breached s. 16(4) of the Local Government Act 1976 which provides:

> ... Provided further that no officer or employee shall be reduced in rank or dismissed without being given a reasonable opportunity of being heard.

[34] The applicant submitted that the right to be heard is enshrined in art. 135(2) Federal Constitution and relied on the case of *Yusof Sudin v. Suruhanjaya Perkhidmatan Polis & Anor* [2012] 1 CLJ 448; [2011] 5 MLJ 465 in support.

Failure To Consider Relevant Documents And Discrepancies

[35] The applicant alluded to the minutes of the first respondent's meeting held on 28 November 2013 where they allege that missing from the 'asas-asas pertimbangan' or grounds of consideration in the said minutes were the following:

(i) the applicant's HOD's letter dated 18 October 2013 which clearly provided an explanation as to the innocence of the applicant and had also stated that the punishment of dismissal or reduction in rank was not appropriate;

(ii) the applicant's police report had not been taken into consideration; and

(iii) the contents of the statement by Dato Azhar in the Hansard itself had not been considered.

[36] They also submitted that the reference in paras. 3.2 and 3.4 of the minutes as to the purported discussion between the applicant and Dato Azhar and the conclusion drawn by the first respondent shows that it had formed a presumption without taking into consideration matters highlighted above.

The first respondent ought to have also asked itself why then, if such a meeting did not take place, did the applicant make a police report denying that he had met with the said Dato Azhar.

[37] The first respondent had also failed altogether to deliberate on the description of the applicant in the Hansard where his name had been wrongly stated as well as the department to which he was attached to.

[38] The applicant submitted that the first respondent had acted in unholy haste in placing the blame on the applicant and finding him guilty under reg. 4(2)(h) Public Officers (Conduct And Discipline) Municipal Council of Province Wellesley Regulations 1995. The said regulation makes it an offence if it could be shown that the applicant had brought or attempted to bring any form of outside influence or pressure to support or advance a claim relating to the public service.

[39] The first respondent had not in any way considered whether the said regulation could be applied to the applicant given the context in which the assemblyman began his speech as follows, "saya masih lagi dalam tajuk demokrasi PKR yang sudah mati". If due consideration had been given, it would have been duly noted that the said assemblyman was not in any way advancing the issue of the applicant's transfer but was instead making an attack on the ruling party. If due consideration were given to the assemblyman's statement then the first respondent would have noted that nowhere at the assembly hearing was Dato Azhar seeking the applicant's transfer to be reversed.

Time Lapse

[40] The applicant submitted that the date of the alleged offence purportedly took place prior to 30 April 2012 and yet it took the first respondent more than a year to issue its letter alleging the charge of attempting or bringing outside influence or pressure against the applicant.

[41] This was also after the applicant's suit challenging his move from the Engineering Department to the Department of Health and judicial review against the decision of the first respondent and/or the second respondent in punishing the applicant with a warning and non-movement of salary for a year.

[42] In support, the decision in *M Sentivelu R Marimuthu v. Public Services Commision Malaysia & Anor* [2005] 3 CLJ 778; [2005] 5 MLJ 393 was cited where it was held as follows:

> (1) The fact that the General Orders Cap 'D' does not prescribe a time limit does not mean that a disciplinary hearing in respect of charges of misconduct brought no matter how long after the event may be upheld as being procedurally fair. It all depends on the facts of each case. In the absence of any reasonable explanation, the longer the delay, the more difficult it would be for the disciplining body to justify the proceedings against the employee (see para 3).

[43] They further referred to a passage in the case by His Lordship Gopal Sri Ram JCA (as he then was) who observed as follows:

> It all depends on the facts of each case. In particular it depends on a number of factors including, the nature of the charge, the length of the delay, the reasons for the delay, the opportunity which the employee had to evidentially meet the accusation levelled at him. In the absence of any reasonable explanation, the longer the delay, the more difficult it would be for the disciplining body to justify the proceedings against the employee. Further, long delay may, when coupled with some other circumstances, amount to strong evidence of condonation on the part of the employer of the employee's misconduct. See *Azman bin Abdullah v. Ketua Polis Negara* [1997] 1 MLJ 263.

[44] They therefore submitted that the delay in prosecuting the charge against the applicant ought to work against the first respondent and more so in this case when the applicant had previously given a written explanation of reasons and/or explanations that were rendered to the Director of Health Services of the second respondent.

Bias

[45] The applicant submitted that he was earlier moved from the Engineering Department to the Health Services Department and this decision was made by the Tuan Yang Dipertua of the second respondent and the Setiausaha Perbandaran (Municipal Secretary) of the second respondent. The said decision was objected to by the applicant who had filed a suit in the Penang High Court to declare the said move null and void. The said suit was dismissed on a preliminary point that the proceedings ought to have commenced by way of judicial review. This was upheld in the Court of Appeal.

[46] Due to this, the applicant contends that 28 November 2013 meeting which panel comprised of the said Yang Dipertua and Setiausaha (Municipal Secretary) of the second respondent could not have been conducted in a fair manner as there would have been bias against the applicant due to the High Court suit.

[47] The two officers had also earlier deliberated and decided that the applicant be punished with a warning and non-movement of salary for one year. The same officers had again during the meeting on 28 November 2013 deliberated and decided to dismiss the applicant. It was thus submitted that there would have been bias in coming to the decision to dismiss the applicant.

[48] The applicant therefore submitted that this application be allowed.

A **Respondents' Submissions**

First Respondent Wrongly Named As A Party

[49] The respondents submitted that the first respondent is a statutory committee established under s. 16(4) Local Government Act 1976 (LGA
B 1976) and its members are determined and fixed by the said provision.

[50] They contended that the LGA 1976 does not provide that this statutory committee can sue or be sued. As such, the first respondent should not have been named as a party to this judicial review.

C **[51]** The second respondent is a local authority established under the LGA 1976 by the State Authority of Pulau Pinang and is responsible for the conduct and discipline of all its employees pursuant to ss. 16 and 17 of the LGA 1976.

[52] The respondents referred to s. 13 LGA 1976 which shows that the
D second respondent is a body corporate and may sue or be sued. They submitted that the statutory committee and committees established pursuant to s. 28 LGA 1976 by the second respondent do not have the capacity to sue or be sued under the LGA 1976.

[53] As the first respondent is a statutory committee of the second
E respondent, all decisions made by the first respondent are the decisions of the second respondent and are binding on the second respondent. In view of this, it was submitted that the first respondent should not be sued in law or named in this judicial review proceedings. The first respondent was therefore wrongly named as a party.

F *The Applicant Is Not The Holder Of A Public Office*

[54] The respondents submitted that the applicant is not a holder of public office holding office during the pleasure of the Yang Di Pertuan Agong or the Ruler of Council of the State of Pulau Pinang or pursuant to art. 132 of the Federal Constitution.

G

[55] The case of *Mohd Ahmad v. Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor* [1997] 3 CLJ 135; [1997] 2 MLJ 361 at p. 145 (CLJ); p. 368 (MLJ), was cited in support where the Federal Court, *inter alia*, held:

> In the instant case, the supervisor has been or was undoubtedly
H employees of the local council ... Employees of local authorities are not holders of public offices holding office during the pleasure of the Yang Di Pertuan Agong or the ruler of any particular state ... as they are not under any category under Art. 132 of the Federal Constitution ...

[56] As the applicant does not fall under the category of officers or
I employees under art. 132 of the Federal Constitution (FC), it was submitted he is not entitled to the protection and privileges under art. 135 of the FC.

Applicant Is Employed Under A Contract Of Service

[57] The respondents submitted that the applicant was employed under a contract of service in the post of an engineer grade J3 in the service of the second respondent based on the conditions specified *vide* letter of acceptance dated 28 June 2012.

[58] They submitted further that the applicant had been appointed by the second respondent under a contract of service and subject to terms and conditions contained in the letter of appointment which, *inter alia*, specifies that the applicant is at all times subject to the Public Officers Regulations (Conduct and Discipline Rules 1995), general orders, circulars, circular letters, regulations and other administrative directions issued by the Government from time to time throughout the service of the applicant with the second respondent. All these regulations, orders, etc had been expressly incorporated into the contract of service of the applicant and regulates, prohibits or restricts the rights of the applicant.

[59] The respondents submitted that the use and enforcement of the Public Officers Regulations (Conduct and Discipline Rules 1995) in the disciplinary proceedings against the applicant by the first respondent does not have the effect in law of making the applicant a holder of an office provided under art. 132 of the FC.

Transfer Of Applicant - A Management Prerogative And Non Justiciable

[60] The respondents further submitted that the transfer of the applicant from one department to another department within the second respondent's organisation and from one place of service to another place within the area of the second respondent's jurisdiction and from the Engineering Department to the Health Services Department is a management prerogative of the second respondent and is non justiciable.

[61] It was submitted, the applicant as a holder of the post of engineer within the closed service of the second respondent does not have any rights to remain in one place of work or in one department only. The letter of applicant's appointment dated 17 June 2002 clearly provides that the applicant is required to serve in any place as directed by the second respondent.

[62] The transfer of the applicant from one department to another department within the organisation of the second respondent was also implied in the conditions of service with the second respondent.

[63] It was also contended that there was no condition or special stipulation in the applicant's letter of appointment dated 17 June 2002 that the applicant's post could not be transferred to another department or divisions or sections within the second respondent's organisation.

[64] The applicant was transferred to the Health Services Department within the organisation of the second respondent to carry out specific duties which required the expertise and the supervision of an engineer. The transfer of the applicant from the Engineering Department to the Health Services Department did not involve any changes or demotion in the grade, position, status, and salary of the applicant.

[65] The applicant was notified that he still remained in the engineering services classification and holds the post of an engineer grade J41 in the Health Services Department and enjoys the same benefits as an engineer grade J41 and his acting position as an engineer grade J41 is still maintained in the new department.

[66] The new head of department of the applicant who was the Director of Health Services was given the applicant's new duty list. The new duty list of the applicant did not require the applicant to provide health services but required him to be involved in the engineering works connected with the public health activities, provided by his new department.

[67] The transfer of the applicant to the Health Services Department was therefore in accordance with the applicant's contract of service and did not breach any conditions of the contract of service with the second respondent.

[68] The applicant did not stop from his work or resign from his post of engineer but continued with his duties and obligations given to him in the Health Services Department including receiving his monthly annulments.

[69] The applicant had accepted the transfer from the Public Services Department with an open mind and without any compulsion from the second respondent. The applicant's contract of service continued and the relationship between the second respondent and the applicant as employer and employee or master and servant continued.

[70] In support of their submission on this point, the respondents placed reliance on the Federal Court case of *Pengarah Pelajaran, Wilayah Persekutuan & Ors v. Loot Ting Yee* [1981] 1 LNS 186; [1982] 1 MLJ 68, which held as follows:

> (i) Whether a civil servant should be transferred and if so where and when the transfer is to be made are matters for the Government to decide. No useful purpose could thus be served in this case by holding a full trial of the respondent's allegations of *mala fide* and unreasonableness.
>
> (ii) As employment in the public service is during the pleasure of the Yang Di Pertuan Agong, so long as a public officer is in the service, it is for the Government to decide whether his transfer is in the public interest or not having regard to the fact that the Government has a large public duty to perform. There was absolutely no legal basis for the court to interfere with the Government's discretion.

(iii) There is nothing in the constitution which entitles an officer to bring his grievances before the court whenever he is punished unless and until the punishment complained of amounts to a dismissal or reduction in rank. No matter how aggrieved an officer is by the punishment, he has no cause of action.

(iv) No officer can claim to have a legal right of non-transferability because of joining the Government service he has become liable to transfer.

[71] They also placed reliance on *Aria Kumar & Anor v. Ketua Pengarah Jabatan Hasil Dalam Negeri, Malaysia & Anor* [1994] 4 CLJ 515 where the plaintiff challenged his transfer from Kuala Lumpur to Kuala Terengganu as being *mala fide*. The High Court, following *Loot Ting Yee* ruled:

> The right of the Government to transfer civil servants cannot be questioned.

[72] The respondents further cited the case of *Dr Ganeshwaran KT Balakrishnan lwn. Pengarah Kesihatan Negeri Perak Darul Ridzuan & Yang Lain* [2011] 2 CLJ 826; [2010] MLJU 1072, where the applicant applied for an order of *mandamus* to revoke the decision of the first defendant ie, Director of Health Perak transferring the place of work of the applicant from Pokok Asam Polyclinic, Taiping to Taiping Hospital. The High Court held that the transfer directive to the applicant constituted a management prerogative as provided under s. 13(h) Public Service Tribunal Act 1977 (Act 186).

Applicant Charged For Attempting To Bring Any Form Of Influence Or External Pressure To Support Or Put Forward Applicant's Claim Against Transfer

[73] The respondents submitted that the issue raised by the State Assemblyman YB Dato Azhar concerning the transfer of the applicant at the Meeting of the State Assembly was directly related to the applicant. They also submitted that the issue whether the applicant appointed the State Assemblyman to raise the issue at the State Assembly Meeting or otherwise and the issue whether the applicant did not meet with the State Assemblyman is not relevant pursuant to r. 4(1) and 4(2)(h) of the Public Officers Regulations (Conduct and Discipline Rules 1995).

[74] The respondents further submitted that the Hansard 2HB report clearly showed that the State Assemblyman YB Dato Azhar at the material time had said that he had met with the applicant and discussed his transfer from the Engineering Department to the Health Services Department. This matter can be clearly seen and reported in the Hansard 2HB report. The respondents said that if there was no meeting or discussion between the applicant and YB Dato Azhar, how was it that YB Dato Azhar had knowledge or information regarding the background of the applicant, the service record of the applicant and also information regarding the transfer direction or order given to the applicant.

[75] They contended that YB Dato Azhar had said according to the Hansard 2HB report:

> ... Dia telah bincang dengan saya, saya bertanya dia pernah ada jumpa dengan Puan Yang Di Pertua MPSP? Dia kata dia pergi kali pertama 2.30 petang, pasal tak boleh. Pasal YDP ada kerja.

[76] The above statement in the Hansard 2HB report therefore clearly showed that a meeting or a discussion had taken place and the applicant had attempted to put forward his claim regarding his transfer to YB Dato Azhar.

[77] The respondents also submitted that the statements of YB Dato Azhar at the Meeting of the Penang State Assembly which had been recorded in the Hansard 2HB report was a public document and therefore could be relied upon to institute disciplinary action against the applicant contrary to the submission advanced by the applicant.

[78] Disciplinary action could therefore be instituted against the applicant as a result of the allegations and statements made by YB Dato Azhar at the State Assembly Meeting since the applicant had breached the Code of Conduct in the Public Officers Regulations (Conduct and Discipline Rules 1995).

[79] The respondents submitted that the attempt to bring any form of influence or external pressure to support or put forward the applicant's claim against the decision of the second respondent to transfer the applicant from the Engineering Department to the Health Services Department at the Meeting of the Penang State Assembly was a serious breach of the Code of Conduct.

[80] The respondents contended further that although the first respondent had considered all the comments of the head of department dated 18 October 2013, his comments were not binding on the first respondent.

[81] The respondents submitted further that although the applicant had requested a committee of inquiry to be appointed constituted by a representative from 'Suruhanjaya Pencegahan Rasuah Malaysia', 'Biro Pengaduan Awam' and 'Suruhanjaya Hak Asasi Malaysia', the first respondent had the discretion to appoint a committee of inquiry pursuant to r. 29(4) of the Public Officers Regulations (Conduct and Discipline Rules 1995) and also the members of the said committee.

[82] It was also submitted that if the first respondent decided that no further clarification was needed from the applicant regarding the alleged breach of discipline, then the applicant could not insist or claim that a committee of inquiry had to be appointed as requested by him and that the failure to do so was a breach of natural justice.

[83] On 28 November 2013 the first respondent considered the written representation of the applicant. In the event, the first respondent decided not to appoint a committee of inquiry as they were satisfied that they did not need further clarification regarding the charge against the applicant.

[84] After considering the written representation of the applicant in respect of the charge faced by him, the first respondent decided that the applicant's representation did not exculpate the applicant to their satisfaction and in accordance with r. 39 of the Public Officers Regulations (Conduct and Discipline Rules 1995) imposed the punishment of dismissal on the applicant. Finally by letter dated 2 December 2013 the first respondent informed the applicant of their decision.

[85] It was submitted by the respondents that the Public Officers Regulations (Conduct and Discipline Rules 1995) did not require the first respondent to notify the applicant that the first respondent were going to meet on 2 December 2013 to consider the charge against him contrary to the contention of the applicant.

[86] It was also submitted, the applicant had been given sufficient opportunity to defend himself and to make written representation and to state his case in accordance with the Public Officers Regulations (Conduct and Discipline Rules 1995).

Appointment Of A Committee Of Inquiry And The Right To An Oral Hearing

[87] It was submitted that the decision whether to appoint a committee of inquiry is in the hands of the first respondent. It was also submitted that the court should not step into the shoes of the disciplinary authority in deciding whether it is fair for the disciplinary authority to have refused or allow the applicant the right to make oral representation.

[88] In this case, the respondents submitted that the first respondent decided that the applicant need not be given an oral hearing as the first respondent considered the case against the applicant required no further clarification.

[89] The case of *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* [2001] 2 CLJ 525; [2001] 2 MLJ 417, was cited in support where the Federal Court, *inter alia*, held that:

> The right to be heard given by Article 135 (2) of the Federal Constitution does not require that the member of the service facing the disciplinary charge be given an oral hearing and it could not be argued that the failure to give that person an oral hearing was a denial of justice.

[90] The respondents further placed reliance upon the case of *Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivelu* [2008] 6 CLJ 573; [2008] 6 MLJ 1, where the Federal Court, *inter alia*, held as follows:

A (i) from the provisions of the general orders it is clear that it is never the intention of the legislators that the courts should step into the shoes of the disciplinary authority in deciding whether it was fair to the respondent, ie, the member of service facing the disciplinary charge to have granted him a right to make oral representation or whether he should be given such right although he did not ask for it;

(ii) it is clear from the facts that the respondent was given an opportunity to be heard whereby he had given a lengthy written representation explaining in detail his innocence; and

C (iii) it is not the court, but the Disciplinary Board which has to decide the question of whether the respondent had exculpated himself by his written representation.

[91] The respondents further cited *Kerajaan Malaysia & Ors v. Tay Chai Huat* [2012] 3 CLJ 577; [2012] 3 MLJ 149, where the Federal Court, *inter alia*, held:

D (i) The law is settled in cases of this genre, namely *Utra Badi*'s case and *Vickneswary*'s case, that the right to be heard given by Art 135(2) of the Constitution did not require a member of the service facing disciplinary charges to be given an oral hearing and that it could not be argued that the failure to give that person an oral hearing was a denial of justice. Thus if the DA considered that no further clarification was required, then the officer facing disciplinary charges could not insist or demand that a committee or inquiry be appointed.

F (ii) The opinion of the DA that the case against the respondent did not require further clarification through the appointment of a committee of inquiry under general order 26 of the GO was not subject to a review by the courts.

[92] Based on the above Federal Court cases, it was submitted that it was for the first respondent to decide whether the case against the applicant G required further clarification. From the facts of this case, the first respondent had concluded that they required no such further clarification. In the circumstances, it is was submitted that this court has no reason to interfere with the decision of the first respondent and as such there is no error of law committed by the first and second respondents.

H **[93]** With regard to the right to an oral hearing, the respondents relied on the case of *Ganasan Marimuthu v. Public Services Commission & Ano*r [1998] 4 CLJ 331; [1998] 4 MLJ 280 where the Court of Appeal, *inter alia*, held that:

I The requirements of fairness had been satisfied by the opportunity to make written representations to the deciding body. A fair hearing does not mean that there must be an opportunity to be heard orally by the officer in person or by his lawyer at the disciplinary authority stage. It is only at the committee of inquiry stage that an oral hearing, and with it the desirability or otherwise of legal representation, can be considered.

[94] It was further submitted that the Public Officers Regulations (Conduct and Discipline Rules 1995) made no provision for an oral hearing if the applicant fails to make a representation in writing or the representation he makes in writing does not exculpate him.

[95] The respondents further relied on the Supreme Court's decision in *Ghazi Mohd Sawi v. Mohd Haniff Omar, Ketua Polis Negara Malaysia & Anor* [1994] 2 CLJ 333; [1994] 2 MLJ 114 which held that the term 'right to be heard' does not mean the right to be heard orally. What it meant was that the officer concerned should be given a full opportunity of stating his case.

[96] Therefore when s. 16(4) LGA 1976 stated that no officer or employee shall be reduced in rank or dismissed without being given a reasonable opportunity of being heard, it meant that there is no right to be heard orally. It suffices if the officer or employee concerned should be given a full opportunity of stating his case in writing.

[97] It was accordingly submitted that the procedures adopted by the first respondent did not in any way involve prejudice to the applicant and there had been no breach of the principles of natural justice.

No Bias On The Part Of The Yang Di Pertua And The Municipal Secretary

[98] The first respondent submitted that the allegations that the Yang Di Pertua and the Municipal Secretary were biased was an unfounded allegation and had no basis pursuant to s. 16(4) of the LGA 1976. It was submitted that the first respondent is a statutory committee and the members of this committee are fixed by the law.

[99] The Yang Di Pertua and the Municipal Secretary had therefore acted in accordance with the law and the LGA 1976 at all material times and there was no issue of conflict of interest or likelihood of biasness when the Yang Di Pertua and the Municipal Secretary constituted and sat at the meeting of the first respondent on 28 November 2013 to hear the allegation of breach of discipline by the applicant.

[100] It was further submitted that all the allegations of the applicant that the Yang Di Pertua and the Municipal Secretary should not have constituted the Disciplinary Board in regard to the second disciplinary action against him were unfounded. There were no applications or representations made by the applicant in his written representation that the Yang Di Pertua and the Municipal Secretary should not sit and decide the second disciplinary action against him. In that regard, submitted the respondents, the applicant had waived his rights.

[101] In response to the allegation by the applicant that the Yang Di Pertua and the Municipal Secretary would have been biased on account of the High Court civil suit commenced by the applicant, the respondents submitted that pursuant to the LGA 1976 and the Public Officers Regulations (Conduct and

A Discipline Rules 1995) the first and second respondents had the jurisdiction to ascertain the seriousness of an employee's misconduct involving the applicant and institute disciplinary action against the applicant if the applicant had committed any misconduct.

B **[102]** It was also submitted that the first and second respondents had sufficient reasons to commence disciplinary action against the applicant in regard to the misconduct of coming late to office. There was no improper or illegal motive. The first and second respondents had acted well within their powers under the Public Officers Regulations (Conduct and Discipline Rules 1995) when it found that the applicant had committed the misconduct of C coming late to work and imposed the punishment of a warning and deferment of the applicant's annual salary increment for a period of 12 months.

Reliance On The Report Of Hansard 2HB

D **[103]** The respondents submitted that the Hansard 2HB report is a public document and the contents of it are admissible in the disciplinary proceedings against the applicant. The weight to be attached to it and assessing it is the function of the first respondent which has been entrusted by the second respondent and the State Authority and Parliament to decide E the issue whether the Hansard 2HB report can be relied upon or otherwise and not for the courts.

[104] The respondents submitted also that despite protestations to the contrary, it was permissible for the first respondent to rely on the Hansard 2HB report to decide on the applicant's alleged breach of the Code of F Conduct without having to investigate the incident by calling YB Dato Azhar.

[105] There was no doubt that the contents within the Hansard 2HB report had only referred to the applicant and no one else.

G **[106]** Therefore based upon the Hansard 2HB report, it was clear that the first respondent had sufficient material to find that the applicant had breached the Code of Conduct mentioned in the charge.

No Requirement For First Respondent To Conduct Ground Investigation

[107] It was submitted further that within the framework of the Public H Officers Regulations (Conduct and Discipline Rules 1995) there was no requirement that the first respondent must conduct ground investigation by itself on the charge against the applicant. The function of the first respondent in a disciplinary proceeding is only to sit in judgment after receiving a complaint of misconduct of the applicant. This is clear from the language of I rr. 25, 27, 28 and 29 of the Public Officers Regulations (Conduct and Discipline Rules 1995).

No Delay In Instituting Disciplinary Proceedings

[108] Replying to the allegation that there was delay in instituting disciplinary action, the respondents submitted that it can be instituted at any time and there was no limitation period to do so. In any event, it was submitted that the disciplinary proceedings in this case were instituted as soon as possible and within a reasonable time. The disciplinary action did not cause any prejudice to the applicant. In support, reliance was placed on the case of *Harbhajan Singh v. Suruhanjaya Pasukan Polis, Malaysia & Anor* [1999] 5 CLJ 275; [1999] 5 MLJ 222.

[109] In reply to the assertion that the applicant was not supplied with relevant documents, the respondents replied that the Public Officers Regulations (Conduct and Discipline Rules 1995) does not make any provision that the first respondent must supply any documents to the applicant before he could make his representation in writing to exculpate himself.

[110] The respondents further submitted that applying the *ratio* in *Ghazi bin Mohd Sawi v. Mohd Haniff Omar, Ketua Polis Negara Malaysia (supra)* it follows that since the first respondent had been following the procedure laid down, it could not be impeached on the ground that they had failed in their duty to act fairly. These memos are not a piece of documentary evidence intended to be used against the applicant at a committee of inquiry which was not established in this case. As such, it need not have to be disclosed to the applicant together with the charge.

Power Of Court To Interfere With Punishment Meted Out By Disciplinary Board

[111] With respect to the powers of the court to intervene in matters such as this, the respondents cited the case of *Ng Hock Cheng v. Pengarah Am Penjara & Ors* [1998] 1 CLJ 405; [1998] 1 MLJ 153 where the Federal Court, *inter alia*, held:

> A court intervenes only on the nature and manner of accusation against a public officer as distinct from a consequential punishment. The court should not substitute its own view as to which was the appropriate penalty for the employee's misconduct, and whether the punishment should be a dismissal or a lesser penalty like a reduction in rank was not for the court to say. An employer, including a government, is the best person to judge the seriousness of misconduct of an employee.

[112] They also relied on the High Court's decision in *Mohd Dali Yahaya & Satu Lagi lwn. Ketua Polis Negara & Satu Lagi* [2010] 1 LNS 326; [2011] 9 MLJ 280 to similar effect.

[113] It was submitted that this court should be slow to interfere with the decisions on matters of fact taken by the first respondent and that there was no basis for this court to substitute its own view for the view of the first respondent in dismissing the applicant.

Court Will Not Order Specific Performance Of A Contract Of Personal Service

[114] It was contended on behalf of the respondents that the court would not order specific performance of contract of service between the applicant and the second respondent or grant declaratory relief which effectively grants specific performance on a claim of wrongful dismissal.

[115] The respondents cited *Mohd Ahmad v. Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan (supra)* in support.

[116] It was submitted in conclusion that the first respondent had acted lawfully, rationally and with due regard to proper procedures. As such, it was contended this court should not substitute its judgment or discretion for the judgment or discretion of the first respondent and accordingly the applicant's application for judicial review to quash the decision of the first respondent made on 28 November 2013 ought to be dismissed with costs.

Analysis And Findings

[117] After hearing and considering the submissions of parties, the main and material issues arising for consideration and determination in this application were as follows:

(i) whether the failure to hold a hearing or inquiry and investigations has resulted in a breach of natural justice and/or procedural impropriety?

(ii) whether the respondents have been guilty of bias against the applicant?

(iii) whether a court can order specific performance of a contract of personal service?

Whether The Failure To Hold A Hearing Or Inquiry And Investigations Has Resulted In Procedural Impropriety Or A Breach Of Natural Justice?

[118] The determination of the answer to this question entails an examination of the legal status of the applicant with respect to his position as an employee of the second respondent and also the rights of the second respondent with regard to their position as employer of the applicant.

Applicant Is Not A Holder Of A Public Office

[119] The applicant here is an employee of a local authority. In the case of *Mohd Ahmad v. Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor* [1997] 3 CLJ 135; [1997] 2 MLJ 361 at p. 368, the Federal Court, *inter alia*, held:

> In the instant case, the supervisor has been or was undoubtedly employees of the local council ... Employees of local authorities are not holders of public offices holding office during the pleasure of the Yang Di Pertuan Agong or the ruler of any particular state…as they are not under any category under art. 132 of the Federal Constitution ...

[120] The applicant does not fall under the category of officers or employees under art. 132 of the Federal Constitution and therefore he is not entitled to the protection and privileges under art. 135 of the Constitution.

[121] Article 135(2) of the Constitution reads as follows:

> 135. Restriction on dismissal and reduction in rank
>
> (2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard

[122] Section 16(4) of the Local Government Act 1976 to which the applicant is subject to state that no officer or employee shall be reduced in rank or dismissed without being given a reasonable opportunity of being heard. Although the wording is similar to the provision in art. 135(2) above, that does not put the applicant on the footing similar to that of a public officer. See *Mohd Ali Ahmad v. Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor (supra)*.

Applicant Is Employed Under A Contract Of Service

[123] I find that the applicant is instead employed based upon terms and conditions in a contract of service between him and the second respondent and subject to terms and conditions contained in the letter of appointment which, *inter alia*, specifies that the applicant is at all times subject to the Public Officers Regulations (Conduct and Discipline Rules 1995), general orders, circulars, circular letters, regulations and other administrative directions issued by the Government from time to time throughout the service of the applicant with the second respondent. All these regulations, orders, etc have been expressly incorporated into the contract of service of the applicant and regulates, prohibits or restricts the rights of the applicant.

[124] However, the use and enforcement of the Public Officers Regulations (Conduct and Discipline Rules 1995) in the disciplinary proceedings against the applicant by the first respondent does not have the effect in law of making the applicant a holder of an office provided under art. 132 of the Constitution. This once again is the clear principle as enunciated in the case of *Mohd Ali Ahmad v. Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor (supra)*.

A Transfer Order Is A Management Prerogative Of The Second Respondent

[125] The second respondent's instructions or directions or transfer orders were an ordinary incident of service which occurred within the second respondent's service and did not result in any amendments to any conditions of service of the applicant.

[126] The transfer of the applicant from one department to another department within the second respondent's organisation and from one place of service to another place within the area of the second respondent's jurisdiction and from the Engineering Department to the Health Services Department was a management prerogative of the second respondent.

[127] The transfer of the applicant from one department to another department within the organisation of the second respondent was implied in the conditions of service with the second respondent.

[128] There were also no conditions or specific stipulation in the applicant's letter of appointment dated 17 June 2002 that the applicant's post could not be transferred to another department, divisions or sections within the second respondent's organisation.

[129] The transfer of the applicant from the Engineering Department to the Health Services Department further did not involve any changes or demotion in the grade, position, status, and salary of the applicant.

[130] The transfer of the applicant to the Health Services Department was in accordance with the applicant's contract of service and did not breach any conditions of the contract of service with the second respondent.

[131] The applicant's contract of service continued and the relationship between the second respondent and the applicant as employer and employee or master and servant continued unhindered.

[132] The courts have consistently ruled in cases involving public officers that unless there are terms and conditions providing otherwise, an officer may be directed to serve anywhere. See *Pengarah Pelajaran, Wilayah Persekutuan & Ors v. Loot Ting Yee* [1981] 1 LNS 186; [1982] 1 MLJ 68, *Aria Kumar & Anor v. Ketua Pengarah Jabatan Hasil Dalam Negeri, Malaysia & Anor* [1994] 4 CLJ 515, and *Dr Ganeshwaran KT Balakrishnan lwn. Pengarah Kesihatan Negeri Perak Darul Ridzuan & Yang Lain* [2011] 2 CLJ 826; [2010] MLJU 1072. These cases although applicable to public officers (which the applicant is not), nevertheless afford a useful guide by way of analogy here. The power to transfer therefore is rendered non-justiciable.

Failure To Accord An Oral Hearing

[133] The applicant contends that the failure of the respondents to hold a hearing or inquiry and investigations even though he had requested for the same had resulted in procedural impropriety or a breach of natural justice. In effect, the applicant contended that he had a right to an oral hearing.

[134] The first respondent however decided not to appoint a committee of inquiry as they were satisfied that they did not need further clarification regarding the charge against the applicant. After considering the written representation of the applicant in respect of the charge faced by him, the first

respondent decided that the applicant's representation did not exculpate the applicant to their satisfaction and in accordance with r. 39 of the Public Officers Regulations (Conduct and Discipline Rules 1995) imposed the punishment of dismissal on the applicant which they informed him by way of letter dated 2 December 2013.

[135] In the Supreme Court case of *Ghazi Mohd Sawi v. Mohd Hannif Omar, Ketua Polis Negara Malaysia & Anor* [1994] 2 CLJ 333; [1994] 2 MLJ 114, it was held that the expression 'right to be heard' does not mean the right to be heard orally. What it means is that the officer concerned should be given a full opportunity of stating his case.

[136] In *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* [2001] 2 CLJ 525; [2001] 2 MLJ 417, the Federal Court, *inter alia*, held that:

> The right to be heard given by Article 135(2) of the Federal Constitution does not require that the member of the service facing the disciplinary charge be given an oral hearing and it could not be argued that the failure to give that person an oral hearing was a denial of justice.

[137] In *Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivelu* [2008] 6 CLJ 573; [2008] 6 MLJ 1, the Federal Court, *inter alia*, held as follows:

> (i) from the provisions of the general orders it is clear that it is never the intention of the legislators that the courts should step into the shoes of the disciplinary authority in deciding whether it was fair to the respondent, ie, the member of service facing the disciplinary charge to have granted him a right to make oral representation or whether he should be given such right although he did not ask for it;
>
> (ii) it is clear from the facts that the respondent was given an opportunity to be heard whereby he had given a lengthy written representation explaining in detail his innocence; and
>
> (iii) it is not the court, but the Disciplinary Board which has to decide the question of whether the respondent had exculpated himself by his written representation.

[138] In *Kerajaan Malaysia & Ors v. Tay Chai Huat* [2012] 3 CLJ 577; [2012] 3 MLJ 149, the Federal Court, *inter alia*, held:

> (i) The law is settled in cases of this genre, namely *Utra Badi*'s case and *Vickneswary*'s case, that the right to be heard given by Art. 135(2) of the Constitution did not require a member of the service facing disciplinary charges to be given an oral hearing and that it could not be argued that the failure to give that person an oral hearing was a denial of justice. Thus if the DA considered that no further clarification was required, then the officer facing disciplinary charges could not insist or demand that a committee or inquiry be appointed.

A (ii) The opinion of the DA that the case against the respondent did not require further clarification through the appointment of a committee of inquiry under General Order 26 of the GO was not subject to a review by the courts.

[139] Although this is a case which does not involve a public officer under B art. 135(2) of the Constitution, the aforesaid cases nevertheless afford useful analogy by way of guidance and I therefore adopt and apply the principles stated therein. Guided by the above decisions of the apex court, it is evident that it is for the first respondent to decide whether the case against the applicant required further clarification. Further, from the provisions of the C general orders it is clear that it was never the intention of the Legislature that the courts should step into the shoes of the disciplinary authority in deciding whether it was fair to the applicant in deciding whether to accord an oral hearing or not. See *Ng Hock Cheng v. Pengarah Am Penjara & Ors (supra)* and *Mohd Dali Yahaya dan Satu Lagi lwn. Ketua Polis Negara Dan Satu Lagi (supra)*.

D **[140]** From the facts of this case, the first respondent had concluded that they required no such further clarification. In the circumstances, this court cannot interfere with the decision of the first respondent and as such there was no error of law committed by the first and second respondents.

[141] Having said that, I am also not unmindful of the Federal Court case E of *Yusof Sudin v. Suruhanjaya Perkhidmatan Polis & Anor* [2012] 1 CLJ 448; [2011] MLJU 656, which held, *inter alia*:

> I would further add to the above quoted passage by stating here that if the principle laid down in *Utra Badi*'s case is to apply to all cases without exceptions then it would appear that no oral hearing may be claimed in F disciplinary proceedings by a public officer facing a case of dismissal or reduction in rank. This in my view cannot be the state of position of the law bearing in mind the significance, purpose and implications of Article 135(2) as a constitutional right.

[142] It must however be borne in mind that firstly, and at the risk of G repetition, the applicant here is not a public officer and is therefore not entitled to the protection in art. 135(2) of the Constitution and secondly, that in *Yusuf Sudin*'s case *(supra)*, the charges framed against the appellant appeared to be general in nature and lacking in particulars. Under the circumstances, it was decided that an oral hearing was necessary. The court H there had also held that each case must be viewed and evaluated on its own facts and circumstances. The court further held that the general principle in *Utra Badi*'s case did not cover a situation where the officer in his representation letter gave an exculpatory statement and also made a special request for an oral hearing.

I **[143]** Therefore, unlike the position in *Yusuf Sudin*'s case where the charges framed against the appellant appeared to be general in nature and lacking in particulars, the show cause letter here by comparison had outlined

in some detail the substance of the charges levelled against the applicant. The letter had spelt out when and where the misconduct had taken place. The specific provision alleged to have been infringed was also stated clearly in the letter as well as the punishment to be meted out in the event the charge was proven. In other words, the said show cause letter had contained all the relevant information that would have left the applicant in no doubt as to the allegations levelled against him.

[144] In respect of the applicant's reply to the show cause letter, the first respondent decided that the applicant's representation did not exculpate the applicant to their satisfaction and in accordance with r. 39 of the Public Officers Regulations (Conduct and Discipline Rules 1995), imposed the punishment of dismissal on the applicant. It must also be borne in mind that the transfer of the applicant was a management prerogative and an ordinary incident of service and on that premise was not open to challenge and certainly in the opinion of the first respondent, not open to any undue pressure or influence exerted on external forces that the applicant had brought to bear in respect thereof.

Reliance On Hansard

[145] The respondents were also justified in coming to a conclusion in respect of the conduct of the applicant in placing reliance on the Hansard 2B which qualifies as a public document within the meaning of s. 74 of the Evidence Act 1950.

Necessity Of Conducting Ground Investigation

[146] Further, on the authority of *Samsuddin Mohd Saad v. Pengarah Hospital Bahagia, Ulu Kinta & Anor* [1999] 1 CLJ 138; [1998] 7 MLJ 785, I find that there was no requirement imposed upon the first respondent within the framework of the Public Officers Regulations (Conduct and Discipline Rules 1995) to conduct ground investigations into the conduct of the applicant.

Failure To Furnish Documentation

[147] The decision in *Samsuddin bin Mohd Saad v. Pengarah Hospital Bahagia, Ulu Kinta & Anor (supra)*, held, *inter alia*, as follows:

> The General Orders, it is clear, did not make any provision that the disciplinary authority must supply any documents to an officer before he could make his representation in writing to exculpate himself under O. 26(2). Neither did it make any provision that any document must be supplied to him when he is called to appear before the Committee of Inquiry for 'further clarification' pursuant to O. 26(5), save that O. 26(7) provides that 'no documentary evidence shall be used against him unless he has been previously supplied with a copy thereof or given access thereto'. Applying the *ratio* in *Ghazi* it follows that since the Lembaga had been assiduously following the procedure laid down, could not be

impeached on the ground that it had failed in its duty to act fairly, if indeed it had not supplied the supervisor's report to the plaintiff - unless that report can be construed under O. 26(7) to be a piece of 'documentary evidence' which was intended to be 'used' against the plaintiff at the inquiry in which case a failure to supply the plaintiff with a copy thereof may constitute a procedural impropriety. But it is clear, the report was not a piece of documentary evidence as opposed to merely a document. It merely contains the investigative summary of what had been previously submitted to the Lembaga for its deliberation into the charges against the plaintiff.

[148] As can be seen even the general orders do not make provision for supply of documents, save in certain instances. As earlier pointed out, as the applicant here is not a 'public servant' within the meaning of the Federal Constitution.

[149] The Public Officers Regulations (Conduct and Discipline Rules 1995) do not make any provision that the first respondent must supply any document to the applicant before he could make his representation in writing to exculpate himself. I also find myself in agreement with the submission of counsel for the respondents that the respective memos sought for by the applicant namely, memo dated 15 May 2012 signed by the 'Pengarah Bahagian Pembangunan Korporat', the memo dated 20 April 2013 signed by the 'Pengarah Khidmat Pengurusan' and the memo dated 13 July 2013 were not pieces of documentary evidence intended to be used against the applicant at a committee of inquiry which in any event was never established in the applicant's case. See *Ghazi Mohd Sawi v. Mohd Haniff Omar*, *Ketus Polis Negara Malaysia (supra)*. In the premises I find that the respondents had not committed any procedural impropriety in this regard.

Delay In Instituting Proceedings

[150] I find myself in agreement with the submission advanced by counsel for the respondents that there is no specific time frame within which to institute disciplinary proceedings and from the circumstances in this case the proceedings were instituted as soon as possible and within a reasonable time frame which did not occasion any prejudice against the applicant. See *Harbhajan Singh v. Suruhanjaya Pasukan Polis, Malaysia & Anor* [1999] 5 CLJ 275; [1999] 5 MLJ 222.

[151] In the circumstances, and for the reasons given above and in the light of the authorities referred to, I find that there has been no procedural impropriety or breach of natural justice by the respondents.

Whether The Respondents Have Been Guilty Of Bias Against The Applicant?

[152] Although the Yang Di Pertua and the Municipal Secretary of the Majlis were members of the Disciplinary Board in regard to the disciplinary case involving the applicant's misconduct of coming to work late and were also members of the Disciplinary Board in regard to the second disciplinary

case involving the misconduct of attempting to bring outside influence, there is no evidence that they were necessarily biased and that therefore they ought to have been automatically disqualified.

[153] The decision and involvement of the Yang Di Pertua and the Municipal Secretary in the decision to transfer the applicant from the Engineering Department to the Health Services Department, as earlier indicated, was an exercise of the management prerogative of the second respondent. This exercise of management prerogative were unconnected to the duties or function of the Disciplinary Board.

[154] The Yang Di Pertua and the Municipal Secretary had acted in accordance with the law and the Local Government Act 1976 and within their management prerogative powers and therefore there was no issue of conflict of interest or likelihood of biasness when the members of the Disciplinary Board met on 28 November 2013.

[155] The civil suit filed in the High Court by the applicant and his appeal to the Court of Appeal were against the decision of the second respondent and had nothing to do with the Disciplinary Board. The Yang Di Pertua and the Municipal Secretary's involvement in the said transfer and the civil proceeding and their participation in the second disciplinary case does not show that they had prejudged against the applicant. Further there is no evidence that they had not conducted the disciplinary proceeding in the fair manner.

[156] Therefore the Yang Di Pertua and the Municipal Secretary's involvement in the second disciplinary case did not amount to actual bias.

[157] The Yang Di Pertua and the Municipal Secretary's involvement in the first disciplinary charge ending with the punishment of warning and non-movement salary for one year and their involvement in the meeting of the Disciplinary Board on 28 November 2013 also did not give rise to personal bias against the applicant.

[158] Further, the applicant did not make any application or representation in his written representation involving the second charge that because the Yang Di Pertua and the Municipal Secretary formed the quorum of the Disciplinary Board they should discharge or recuse themselves and not decide the second disciplinary action against him.

[159] The applicant's conduct in not making any application or representation in his written representation to recuse the Yang Di Pertua and the Municipal Secretary from the Disciplinary Board therefore constitutes a waiver by the applicant and bars the applicant from any subsequent complaint in the judicial review proceedings.

[160] Automatic disqualification of the Yang Di Pertua and the Municipal Secretary does not necessarily follow from their involvement in the transfer of the applicant from Engineering Department to the Health Services Department or from their involvement in the first disciplinary case.

[161] The test of bias applicable in our jurisdiction as pronounced by the Federal Court in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 CLJ 65; [1999] 3 MLJ 1 is the test of apparent bias as laid down in *R v. Gough* [1993] AC 646 ('the real danger of bias' test) as the Federal Court was of the view that this will avoid setting aside of judgments upon quite insubstantial grounds and the flimsiest pretexts of bias.

[162] Applying this test to the factual circumstances here, it cannot be said that there was apparent bias or a real danger of bias.

[163] Further, a statute may expressly or by necessary implication, exclude the rule against bias. Section 16 LGA 1976 and the disciplinary rules confer adjudicatory power on the Municipal Secretary and there is no one else who can substitute him. Therefore the Municipal Secretary may have no choice but to adjudicate upon a case even where bias may be imputed.

[164] See *Mohd Zainal Abidin Abdul Mutalib v. Dato Seri Dr Mahathir Bin Mohamed, Minister of Home Affairs, Malaysia & Anor* [1989] 1 LNS 51; [1989] 3 MLJ 170.

[165] An adjudicator who may otherwise be disqualified from adjudicating on a dispute because of bias, may still have to adjudicate on the matter because there may be no one else left competent to decide the matter, or if a quorum cannot be formed without him or her. This exception is based on practical necessity. So necessity can also exclude bias.

[166] Although reg. 26 of the Public Officers (Conduct and Discipline) Municipal Council of Province Wellesley Regulations 1995 provided for an alternative to the Yang Di Pertua to sit as part of the disciplinary authority and therefore cannot be said to be subject to the doctrine of necessity, it does not automatically mean that bias existed. The 'real danger of bias' test requires a certain threshold to be crossed before it can be successfully alleged that there existed bias and the mere fact that the Yang Di Pertua had sat on the disciplinary authority under the circumstances does not enable an inevitable conclusion to be forged that there was bias on her part. This is more so when the right to transfer the applicant was well within management prerogative and an altogether separate exercise in that respect and so it cannot be necessarily concluded that bias arose under the circumstances.

[167] In all the circumstances of the case, I therefore find that the allegations of bias against the respondents were unfounded.

Whether A Court Can Order Specific Performance Of A Contract Of Personal Service?

[168] The court will not order the specific performance of contract of service which existed between the applicant and the second respondent or grant declaratory relief which effectively grants specific performance on a claim of wrongful dismissal.

[169] In *Mohd Ahmad v. Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor (supra)*, the Federal Court, *inter alia*, held:

(a) The principle is that the court will not order specific performance of a contract of service between master and servant, except where: (i) a claimant/employee before an Industrial Court claiming for reinstatement on ground of dismissal without just cause or excuse under s 20 of the Industrial Relations Act 1967; and (ii) a holder of any public office as set out in art 132 of the Federal Constitution."

(b) Employees of local authorities, such as the appellant in general, are employed purely on a contractual basis and they are not holders of public offices as they are not under any category under art 132 of the Federal Constitution.

(c) Therefore, the claim for reinstatement available to a permitted claimant in the Industrial Court or to a holder of a public office as categorised under art 132 of the Federal Constitution was not available to the appellant. The principle was applicable, and he was entitled to claim damages only if he could establish that his dismissal was in breach of his contract of service. The non-observance or non-compliance of the General Orders in the case of the supervisor herein was equivalent to a breach of condition of the contract of personal service of the supervisor, the condition being the use of such General Orders. The objection to the effect that the appellant could not claim the declarations that his dismissal was void and that he continued in office was correct and it was therefore correctly accepted by the learned judge who held, equally that it was not possible for the appellant herein to obtain reinstatement.

[170] Therefore a claim for reinstatement available to a permitted claimant in an Industrial Court or to a holder of a public office as categorised under arts. 132 and 135(2) of the Federal Constitution is not available to the applicant. He is entitled to claim damages only if he can establish that his dismissal is in breach of his contract of service. As the applicant cannot resort to the provisions of the Industrial Relations Act 1967, he accordingly cannot claim the declarations that his dismissal was void and it is not possible for him to obtain reinstatement. Whichever manner the applicant's declarations or prayers are couched, the inevitable result of declaring that his dismissal is void will result in reinstatement which is not permitted.

[171] In *Perbadanan Perwira Harta Malaysia & Anor v. Mohd Baharin Hj Abu* [2010] 6 CLJ 1, the Court of Appeal held, *inter alia*, that to create another possible exception in addition to the two decided in *Mohd Ahmad (supra)* there must exist, in support of the employees employment, a statute of a similar nature and effect as that available in *Malloch v. Aberdeen Corporation* [1971] 2 All ER 1278. The court found no legislation even close to the legislation before the House of Lords in *Malloch (supra)*, in support of the respondent's employment to elevate him to the position where he could ask for declaration that his termination was null and void and that he be reinstated.

[172] Further, pursuant to s. 20(1)(b) of Specific Relief Act (SRA) 1950, an employee who has been wrongfully dismissed cannot seek specific performance of his contract of employment. Section 20(1)(b) of SRA 1950 is consistent with the common law position that as a contract of employment is a contract dependent on the volition of the parties, it cannot, in the absence of special circumstances, be specifically enforced either by a declaration that the contract still subsists or that the dismissal is invalid/void.

[173] For the reasons as stated above, I therefore dismiss this application with costs.